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HEARINGS

Before The

SUBCOMMITTEE ON AIR AND WATER POLLUTION

COMMITTEE ON PUBLIC WORKS

UNITED STATES SENATE

*Lower subcommittee*

EXECUTIVE SESSION

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EXECUTIVE SESSION

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TUESDAY, JUNE 29, 1971

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United States Senate,

Subcommittee on Air and Water  
Pollution, of the Committee  
on Public Works,

Washington, D. C.

The subcommittee met at 3:45 p.m., pursuant to call, in room F-100, The Capitol, Senator Edmund S. Muskie (chairman of the subcommittee) presiding.

Present: Senators Muskie, Bayh, Tunney, Bentsen, Cooper and Boggs.

Staff present: Mr. Barry Meyer, Chief Counsel; Leon Billings, Professional Staff Member; Tom Jorling, Minority Counsel; Dr. Walter Westman, Ecological Adviser to the Subcommittee.

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Senator Muskie. The subcommittee will come to order.

Senator Bayh. On page 41, Mr. Chairman, in Section 504, why do we limit 504, subsection B, to treaty-protected fish and wildlife or where there is an inability to market the shellfish or shellfish products? How wide a list is encompassed in treaty-protected fish and wildlife?

Mr. Jorling. I think the question here is under what circumstances can you build a case for rather strong and direct federal intervention to abate pollution, abate a pollution situation. The general framework of the Act provides for a regulatory scheme to get a solution. This provision is designed to enable the Federal Government to sort of circumvent the Act in those situations where federal direct authority is most appropriate.

It appears that that would probably only be appropriate where there is an obligation on the Federal Government to retrieve, or because of the commercial involvement of shellfish which are also, I think, at least in this sense, almost synonymous. Most shellfish are treaty-protected.

It is simply a limitation on the federal direct power to abate pollution in rather extreme circumstances.

Senator Bayn. Let me pose an example. Suppose, according to that, the tuna fish on the Columbia River are being killed. You can abate that. But on the Wabash, the catfish, between Indiana and Illinois, on the boundary, would not be sufficient

to abate? Is that a fair comparison?

Mr. Jorling. I think a literal interpretation of this would have your assessment correct. There is another aspect to this that must be considered in context. In the hazardous substance provision it deals with giving the Federal Government authority to mitigate the effects of the discharge of hazardous substances, which are the kinds of things that usually create the situation you suggested on the Wabash.

Whether or not that is adequate, I guess, is questionable. But to reach these things as directly as authorized under this section the staff has recommended limiting it to those areas where the Federal Government has a special obligation, either by treaty or by the commerce clause to protect.

When you go beyond that and you start to get into the gray area between what the rest of the Act is trying to accomplish and what this is trying to accomplish, I don't know.

Mr. Billings. I think what Tom is trying to say, Senator Bayh, is that if you go to imminent or substantial endangerment to fish and wildlife in general you could find that virtually all pollution presents an imminent or substantial endangerment to fish or wildlife at some point.

Therefore, you would be setting up, through this, another basically refuse act type approach where you could act to abate any source of pollution on the basis that that source of pollution by itself presented a substantial endangerment to fish.

Senator Muskie. I think this originated around the shellfish problem because HEW through its health activities, can close shellfish beds, oyster beds, clam beds, and so on, because they are unfit to eat as a result of pollution. The theory was, when this was written into the law originally, that since the Federal Government has that punitive power to close the beds, that it ought to be empowered to go the next step and get at the polluter who is responsible for that condition and that decision by the Federal Government.

I don't know when the treaty-protected fish or wildlife phrase came in.

Mr. Billings. That is new.

Senator Bayh. Was it the mercury situation, perhaps?

Senator Muskie. They did that under the Refuse Act. This shellfish provision was written in in 1965 and it has been used. The staff, for a reason I don't know anything about, has added treaty-protected fish or wildlife. If you keep adding to them, you will have the result that you have described.

Mr. Billings. What you say is correct. It is not bad. But the point is that the departure is whether you make an arbitrary judgment that you have to stop discharging, period, or whether you take a period of time in which a polluter has an opportunity to construct a facility or change a process or what have you to reduce his pollution to the point where fish and wildlife are not adversely affected.

This is an extremely arbitrary action. This, in fact, would have the effect of closing down the plant for these purposes. The question the committee must address itself to is do you want to provide this kind of emergency authority to protect any fish and wildlife anywhere under any conditions?

If that is the case, then for all practical purposes you can eliminate the rest of the bill.

Senator Muskie. Why have we included treaty-protected fish?

Mr. Jorling. My recollection is that it was recommended in the Administration bill.

Senator Bayh. Let's not get all tied up on that. I was just curious.

Senator Muskie. Give me some examples of treaty-protected fish.

Dr. Westman. Salmon, whales, halibut, ocean perch.

Senator Muskie. In what circumstances with pollution emanating from a point source on the mainland of the United States or an island threaten whales? They can avoid it, can't they?

Mr. Billings. They might not know that.

Senator Muskie. What are we going to do, monitor the movement of whales? If they happen to move into a polluted area, we are going to take this kind of arbitrary action?

Mr. Billings. That would be a whale of a job.

Senator Muskie. It sure would be. I don't quite then get this. You are talking about what? I don't quite see the rationale for that position.

Mr. Billings. Can we withdraw on this and prepare a memorandum to the members on the impact?

Senator Muskie. The shellfish are fixed in beds, and that is why we provided their protection. Senator Boggs and I were both interested in that. But if you are talking about fish that move in and out of waters like whales and halibut, that is something else.

Mr. Billings. The staff withdraws.

Senator Muskie. Give me a "for instance." Where has a fishing ground of that kind been threatened by that kind of pollution?

Mr. Billings. Swordfish with mercury.

Dr. Westman. One rather current example is where they leaked nuclear waste in the area in the Aleutians which threatened fishing rights of Japan and others. So there would be a point source on land that would control the pollutants which would have an effect on international fishing.

Senator Muskie. But if it is Uncle Sam, himself, who is the point source, will he move against himself to stop himself? That would be an interesting picture. Do you suppose we can get some department of the government to do that?

Dr. Westman. It is very hard to give up, Mr. Chairman.



We are trying.

Senator Muskie. Let's get a memo on it so you can define this a little better. It may be there are a lot of cases, but none can occur to me.

Senator Bayh. Let me go one step further, if I might. I don't want to pursue this to the place where we are not moving forward. I accept the philosophy of let's give the companies involved time to remedy the situation instead of closing down.

Suppose in the time necessary to remedy it kills all the rainbow trout?

I am not a great fisherman. I haven't caught more than one fish in my whole life. But then what good does it do to clean up the stream?

Mr. Billings. Under the toxic substances provision. We have two things which should assist in solving that problem. One, the staff has recommended that certain things that are toxic by definition be banned entirely, the mercury type substances.

The proposed draft will set forth that the discharge of those is prohibited, period. Then there will be other substances which are quantitatively toxic. In certain quantities, in discharge, they would be toxic to fish and wildlife, et cetera. The emission of these in quantities greater than that effluent limit would be prohibited.

That would be triggered in a much shorter period of time than would the provision for the general effluent standards under compliance implementation. What is the time on that, six months?

Mr. Jorling. It is less than that. It is thirty days' notice, but there is no notice required for the Federal Government to enforce the toxic substance discharge.

Senator Bayh. What about thermal pollution? In that situation, would it have the same effect? It wouldn't have the same downstream effect as toxic.

Mr. Billings. I suppose there would be a level at which a thermal discharge could cause a toxic effect on stream, but that is sort of difficult to conceive.

Senator Muskie. Not toxic. You would drive out such fish.

Mr. Billings. Well, toxic is killing.

Senator Bayh. But not in the traditional sense.

Senator Muckie. A hydroelectric dam can drive away the trout. It can raise the temperature enough.

Senator Boggs. It doesn't kill them. They just leave and go somewhere else.

Senator Muskie. It destorys the fishery.

Mr. Jorling. If there were a thermal discharge standard of ten degrees, whatever it was, and for some reason the cooling equipment broke down on a facility and it found it necessary,

if it were a nuclear plant, to discharge very large quantities of very hot water and there was a massive fish kill, there would not be remedies other than the standard enforcement provided for in the act. There would not be the ability of the Federal Government to use the substantial endangerment and immediately enjoin the facility. That would probably be mitigated in this case by the radiation safety problem that would require the continuation of the cooling water at the expense of the stream, temporarily or even a longer temporary effect.

But under the staff draft the present enforcement would be limited to either state or federal action under the federal enforcement section, for the state to get the immediate restraining order to a federal court to stop the activity.

The distinction that you pointed out, whether we provide for the procedure very rapidly in each of these cases, would be the real question.

Right now it is limited to, one, either the health of persons, or, two, under the revision, to shellfish. That is in the immediate situation.

There is one other area that you recognize. We do have a provision to try to address this. If there is discharge of hazardous material into the Wabash River, and let's say it is DDT, and the discharger is known, and it is a one-shot affair, we have a provision here that because that is the kind of material that is not cleaned out, you can't remove it, you

can't do that -- we have a provision for the assessment of liquidated damages on a rate measured by the amount of material discharged into the water to try to in part get at the question which I think you identified, that with some of these materials when discharged there is nothing you can do about it.

What kind of penalty or what kind of sanction can you apply in these situations? Abatement is not appropriate because it has happened, and it is not continuing.

Senator Muskie. It seems to me that if there is a justification for protecting treaty-protected fish and wildlife, there is an obligation to protect any fish and wildlife. Why treaty-protected fish and wildlife?

Senator Boggs. I agree.

Senator Muskie. They are more likely to be out in the open ocean, aren't they?

Mr. Jorling. Treaty-protected fish and wildlife give the Federal Government an obligation whereas under our law fish and wildlife are normally the property and responsibility of the United States. There was a recent judicial ruling in Arizona that said that fish and wildlife on national parks are under the control of the states, even though the Federal Government owns the land.

Senator Muskie. Most people, with respect to their rights and protection, are under the jurisdiction of the states, but we still protect them with federal laws.

Senator Bayh. We are in the process of putting together a piece of legislation that will change the responsibility for pollution control. That is why I raised it. It seems to me it is how are we going to determine that it is in the national interest to save fish from being killed.

It doesn't make much difference to me whether it is whales or trout. As I say, I don't speak as a great fisherman.

Mr. Billings. The only doubt the staff would raise about this is that that is a lot of authority. A major discharge of some kind that is causing a fish kill, yes, it should be abated and should be abated immediately. But how do you limit that authority so that you don't get into a capricious situation?

Senator Bayh. Isn't that the question on everything? How to limit it to keep from being capricious about it?

Mr. Billings. Having watched the procedures under the Refuse Act, there are grave doubts as to how much purely administrative authority you extend.

Senator Bayh. That may be so. This is the last question I will ask: If that is the case, why the treaty fish?

Mr. Billings. I withdrew on that a long time ago.

~~Senator Bayh~~ Senator Muskie. Let's get an analysis of this treaty-protected fish case and then we can look at the whole case. I have just seen this for the first time myself today, so I have no personal explanation for it. The shellfish thing

started years ago. That has been on the books. It has been used. They, of course, can't move. They are at the mouths of rivers and estuaries and can't move. The Federal Government can close them down. It has the power to just close them down. It always seemed inequitable, at least to Senator Boggs and myself, that the culprit is not those who get their living off the clam beds or oyster beds, but a polluter, and yet the punitive power of the Federal Government is directed against the innocent party and the guilty parties escape scot-free.

That was the basis for the shellfish amendment, which I still think is a sound basis and limits the tough authority. I wouldn't say arbitrary. I don't think it is arbitrary. Oh polluters irrevocably damaging a clam bed, to get at him is not arbitrary, but is necessary.

Senator Bentsen. Is it the subcommittee's plan to go to the committee with this bill after this meeting?

Senator Muskie. If it is possible, if we can.

Senator Bentsen. I have one amendment I would like to bring up that may be out of order on the agenda. I assume I may not be able to bring it up later.

Senator Muskie. Bring it up now.

Senator Bentsen. It is on page 17. It gets to the section 303(A), which says, "provide for the attainment of the water quality standards as expeditiously as practicable but in no case later than three years from the date of approval of

such plans."

I was listening this morning to the question about application for permits going through some 70 decision-making processes. There is the question of the states having to bring their plans forth in nine months and the administrator approving them within four. I feel that the language of the Clean Air Amendments of 1970 provides that in the case of air pollution, standards necessary to protect the public health are done within a three-year period, but that all other air pollution standards were to be obtained by the states as expeditiously as possible.

If that is applicable to the Clean Air Act, then it would seem to me it would be equally appropriate to the Water Quality Standards. This leaves the Federal Government in the position where they still have the power to define what is "as expeditiously as possible," so if they felt a state was dragging its feet, they can have some ability to influence further progress of it.

I am concerned that it simply is not feasible to achieve all the water quality standards within a three-year period. And yet by the same token, where it endangers public health, then I think it should, and all should be as expeditiously as possible.

That is apparently the language agreed to before on the Clean Air Act. I don't want to set up a bunch of unrealistic time frames.

Senator Boggs. A question has just been raised to me, Mr. Chairman, with regard to Senator Bentsen's suggestion, whether it is three years or a realistic period depending a lot upon what standard we set up, what standard we eventually adopt here.

Senator Bentsen. We are talking about states coming up with plans for implementation within nine months and then the administrator having four months to approve, and then saying across the board we will achieve it in three years. I can't see that, where we have public health involved, to emphasize them, and the rest of them "as expeditiously as possible."

I don't want to see us get into a series of requirements that are so unrealistic we get a backlash against what we are trying to accomplish in cleaning up the environment.

Senator Muskie. Let me say this: What Senator Boggs has said is relevant. We have not yet decided what, if any, national standard we are going to adopt, whether it is Senator Tunney's or some other. Until we have that, I think all those numbers ought to be blanks, frankly, because any number we put in there now would be arbitrary until we know what it is that we want people to achieve.

I support the idea of deadlines provided they are related to a rational objective and clearcut public interest goal, because I think otherwise you tend to just -- well, "expeditiously as possible" is a pretty ambiguous phrase. The states vary a



great deal. But we haven't yet identified a national standard that satisfies me.

My suggestion would be that we simply put in blanks for the nine and for the three, and wherever else there is a number at the present time until we resolve the question of the national standard, itself. I think the blanks ought to be in the committee print.

Senator Bentsen. Perhaps so, Mr. Chairman. I believe that concentration should be on those things affecting public health, and that there the deadline should be tougher.

Senator Muskie. The public health standard would vary. If it is drinking water, it is one thing. If it is swimmable water, it is another thing.

Senator Bentsen. We have chosen to use that as a criteria in the Clean Air Act.

Senator Muskie. Yes, but in health, it is easier to connect it with health because everybody is breathing the ambient air. You don't have to drink toxic water. You can go until you find a clean supply. You don't want to say that every body of water ought to be drinkable.

Frankly, I am not satisfied that we have yet identified a national standard that you can gear a timetable to. I am all for laboring to find one.

Senator Tunney, of course, is pressing his very hard. I think we need some definition of it before we can react to it,

before I can at least. Frankly, I would like to find a standard of some sort that would make it possible for us to impose certain performance or certain achievement by a certain time, if we can find it. I am not interested in closing down the independent industrial establishment of America because I don't think that is the answer.

But, on the other hand, it is possible to leave too big a loophole.

My own preference would be to leave those numbers blank -- that is simply my preference -- and focus right now on whether or not you want to include in a committee print the standard that Senator Tunney has been talking about.

I suppose we ought to up and vote.

Senator Boggs. Yes. This is a conference report, I understand, on public service.

Senator Muskie. Non-controversial and the President is going to sign it.

Senator Boggs. I don't know.

(Brief recess.)

Senator Muskie. The subcommittee will be in order.

Why don't we authorize the staff to put out a committee print, John? I think we have gone over the bill enough now so that it will give us something to work with. Sure, it would have some concepts that not everybody buys yet, but it would be useful in generating comment, and I think if we could have

that by the time we come back from the July 4th recess, it would be easier then to start putting the thing together.

Senator Cooper. I have come here to cast my vote yes.

Senator Muskie. I see no reason to poll the committee. We will go ahead and do that.

Mr. Meyer. I think the committee by agreement at the first executive session agreed to that.

Mr. Billings. It was only a question of polling as to what it contained.

Senator Muskie. I think we will go ahead. There is no implication that everybody supports what is in it, but there aren't any great, horrendous things in it. There are somethings we don't agree about yet.

Mr. Billings. And this one has been leaked all over town anyway.

Senator Muskie. That is right. We might as well let people on the outside know that things are really as bad as they thought.

Mr. Meyer. Will there be a press release on this indicating clearly the ground rules, that there has been no agreement by the committee?

Senator Muskie. There have been no votes on it, this is simply a working print that we thought ought to be available to interested parties.

Mr. Billings. We ought to be able to get that done by

Sunday or Monday.

Senator Muskie. All right.

With that, we will recess subject to the call of the Chair.

(Whereupon, at 4:50 p.m., the subcommittee recessed, subject to the call of the Chair.)

